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CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

Note verbale dated 6 October 1993 from the Permanent Mission of the Republic of Bulgaria to the United Nations addressed to the Secretary-General

The Permanent Mission of the Republic of Bulgaria to the United Nations presents its compliments to the Secretary-General of the United Nations and has the honour to inform him that the Bulgarian Government welcomes the opportunity to submit written comments and observations on agenda item 147 of the forty-eighth session of the General Assembly, entitled "Convention on jurisdictional immunities of States and their property" (see annex).

The Permanent Mission of the Republic of Bulgaria to the United Nations would be very grateful if these could be circulated as a document of the General Assembly.

Annex

POSITION OF THE REPUBLIC OF BULGARIA REGARDING AGENDA ITEM 147 OF THE FORTY-EIGHTH SESSION OF THE GENERAL ASSEMBLY, "CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY"

1. The Bulgarian Government regards the draft articles on jurisdictional immunities of States and their property adopted by the International Law Commission as a good basis for talks with a view to negotiating mutually acceptable provisions of a multilateral international convention. It would also like to express its appreciation for the enormous amount of work carried out by the International Law Commission.

2. The Bulgarian Government welcomes General Assembly decision 47/414 of 25 November 1992, by which the Assembly decided to re-establish the Working Group in the framework of the Sixth Committee at its forty-eighth session. We are of the view that the Working Group, bearing in mind the current economic and commercial conditions, should focus its efforts on bringing into line the different positions and on working out an international consensus on the issues of substance with a view to convening an international diplomatic conference in 1994. In this respect the Working Group's task will be facilitated by the progress made during the forty-seventh session of the General Assembly under the skilful guidance of the Chairman of the Group, Ambassador Carlos Calero-Rodrigues.

3. The Government of the Republic of Bulgaria approves of and accepts the basic concept underlying the draft articles, namely the distinction which is made regarding the activity of the State and based on the criteria acta jure imperii and acta jure gestionis.

4. Bulgaria considers the present formulation of paragraph 1 of article 2, and more specifically the definition of the concepts "court" and "State", satisfactory. It should be borne in mind that the State carries out its functions through its agencies and instrumentalities, and where relevant, through its political subdivisions. For this reason, its regime could not be different from the regime of its subdivisions. We are of the view that the formulation of this provision cannot give rise to any doubts or problems, because normally the organs and individuals through which each State exercises its sovereign authority and through which its responsibility is engaged, are provided for in its Constitution.

5. As regards the concept of "commercial contract or transaction" contained in paragraph 2 of article 2, the Bulgarian Government believes that it represents an acceptable compromise formulation. Without presently having a legal definition, both criteria for defining commercial transactions (character and purpose) are accepted in the Bulgarian legislation. At the same time, Bulgaria would prefer the commercial character of a transaction to be determined mainly on the basis of its nature, i.e. we are of the opinion that the character of the transaction itself should determine its purpose. The requirement of double qualification, more specifically the use of the criterion "purpose", could in the future give rise to many disputes as a result of different interpretations.

The arguments in favour of the use, as "a preventive measure", of the "purpose" of a transaction as a criterion in determining its character are not very strong considering the provisions of paragraph 1 of article 6, according to which the court of the forum State determines in its own way the exercise of the immunities of the foreign State. Besides, it is very important to provide the necessary protection for all parties to a given commercial transaction, which from the very beginning should be advised of its purpose and the ensuing possibility for the State to invoke jurisdictional immunity. Notwithstanding the outlined considerations, in case a compromise has to be reached through the adoption of the criterion of the "purpose" of a transaction, we consider the compromise formulation of the Chairman of the Working Group (A/C.6/47/L.10, para. 15) acceptable, according to which, at the time of the conclusion of the transaction, the respective State should expressly indicate its purpose.

6. The formulation of article 10 is also acceptable for the Bulgarian Government. The participation of Bulgarian State enterprises in the international trade exchange does not present any difficulties from the point of view of the internal law of the country. In its development over the last decades, the Bulgarian economic legislation is persistent in its position in favour of the non-liability of the State-owned economic enterprises for State debts and vice versa. Under the express provision of paragraph 2 of article 1 of The Transformation of State-owned Enterprises into Single-Person Commercial Partnerships Act, enterprises cannot be granted administrative competence in connection with foreign economic activities. Under the principles of the current Law on Commerce and the established views in the legal doctrine, the enterprises founded on the basis of State property are subject to the private law and State property will be transformed into property belonging to the newly founded economic entity (commercial company). Therefore, with regard to these enterprises, the common provisions of the civil law and the international law will be applied.

7. The Bulgarian Government would like to express its support for the provisions of article 16 regarding the immunities of the ships owned by the State or operated by the State for non-commercial purposes, as well as those of the naval ships. Along with this, Bulgaria would prefer it if the formulation of article 16 could be brought into line with article 96 of the 1982 United Nations Convention on the Law of the Sea.

8. The Bulgarian Government shares the view of a number of countries that, in those cases when the State does not enjoy jurisdictional immunity, it should be entitled to the same rights as the other parties to the proceedings. Therefore, its position is in favour of introducing the relevant corrections in the provisions of article 22, paragraph 2, to ensure the necessary guarantees for the payment of court expenses.

9. The Bulgarian Government supports the proposal for the drafting of provisions for the peaceful settlement of disputes ensuing from the interpretation and the application of the future convention, which later will be presented together with the other draft articles to the attention of a multilateral diplomatic conference.